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Net Neutrality in a “Peripheral” but Pioneering Country: Policy Processes, Consequences, and Developments in Slovenia

Marko Milosavljević***Melita Poler******Tanja Kerševan Smokvina*****

SUMMARY

This paper analyses policies and regulation addressing net neutrality in Slovenia. It traces them from their bold beginnings in 2012 to their harmonisation with prevailing trends and practices in the European Union, following the enactment of EU rules on net neutrality in 2016. The study, based on qualitative document analysis and supplemented by interviews with stakeholders, showed that Slovenia was not successful in advocating stronger EU net neutrality safeguards. The rules of the single digital market within the EU with the limited subsidiarity of member states made it impossible to apply the original Slovenian legal safeguards. This indicates a reduced potential of nation states to advocate their communication policy objectives within the EU framework on one hand, and their ability to influence EU policymaking by encouraging a quicker common response with independent action on the other. Further research is required into the potential re-evaluation and extension of the concept of net neutrality, to

* Dr. Marko Milosavljević, Associate Professor at the Faculty of Social Sciences (University of Ljubljana), Slovenia. E-mail: marko.milosavljevic@fdv.uni-lj.si.

** Dr. Melita Poler, Professor at the Faculty of Social Sciences (University of Ljubljana), Slovenia. E-mail: melita.poler-kovacic@fdv.uni-lj.si.

*** Dr. Tanja Kerševan Smokvina, Researcher at the Faculty of Social Sciences (University of Ljubljana), State Secretary at the Ministry of Culture, Slovenia. E-mail: tanja.kersevan-smokvina@fdv.uni-lj.si.

address the full extent of discriminatory treatment of internet traffic, not limited solely to networks.

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Introduction

Technological developments often create discussions about how public policies and regulations should respond to them, and to what extent governments should meddle in their implementation. The main question is that of how to safeguard public interest objectives without hindering innovation. Policies addressing net neutrality within the wider framework of electronic communications are an example of contemporary policy being developed as a reaction to technological innovations and transformations, and require closer examination in order to realise “a conceptual re-evaluation of a new communication technology” (Bollinger, 1990: 103).

Our approach to the critical assessment of net neutrality policy evolution in Slovenia builds on Lippmann’s thesis that the general circumstances for transformation and development are not merely a result of a “technical change”, but are “a creation of the state through its laws” (Lippmann, 1937: 14), with the causes of specific developments “to be found not in the technic of production, but in the law” (ibid., 13). This also applies to contemporary technologies, digital innovations and disruptions, and the issue of net neutrality. Our approach is in line with that of Bollinger, who states that “sometimes when new media arise /.../ the government must intervene to bring order to the system” (1990: 121). Technologies and services enabling societal transactions or affecting the exercise of fundamental rights – like those enabling the internet – require a certain legal and regulatory framework. The issue is how elaborate and restrictive this framework should be, and how to define when Bollinger’s (1990) “sometimes” occurs.

This paper focuses on net neutrality as a specific topic within the electronic communications policies that have been developed in the last two decades, along with digitalisation and new information infrastructures. It refers to the policy and regulatory choices for framing network management practices (Belli & De Filippi, 2016: 2–3), and is closely related to citizens’, institutions’ and companies’ access to information and its distribution, insofar as it implies non-discriminatory treatment of internet traffic regardless of content, service, source or destination. Slovenia was one of the few pioneering countries that responded to the emerging risks of the differential treatment of internet traffic by recognising the discrimination of services by internet services providers (ISPs) as one of Bollinger’s “sometimes” situations, in which “the government must intervene to bring order to the system” (Bollinger,

1990: 121). The country introduced net neutrality regulation in 2012 with its Electronic Communications Act (Zakon o elektronskih komunikacijah [ZEKom-1]), just after Israel and the Netherlands. It was the second country in the EU with such regulation enshrined in law, and was one of few to ban price differentiation in favour of data traffic associated with a particular application (i.e. zero-rating).

Although a small country, normally excluded from international research on policy innovation, it is important to study Slovenia for its often pioneering approaches, especially regarding communications and the internet. Despite being named one of the most bitcoin-friendly countries in recent years (partly because of its positive regulatory framework), and having a long history of dedication to AI research (the nation is currently establishing Europe’s first international AI research centre), Slovenia and its digital policies have rarely been analysed and researched, particularly in an international context. In Negroponte’s *Being Digital* (1995), Slovenia was mentioned as one of the countries with the fastest-growing number of internet hosts, and has been praised by researchers and futurologists. John Naisbitt (in Milosavljević, 1996: 35), for example, states that information technologies in Slovenia “will need to be even further emphasized”. Marsden (2016: 14) outlines some of the reasons for the lack of in-depth research on Slovenia’s net neutrality approach: “Due to the language, limited regulator and the peripheral nature of Slovenian (population 2 million), Slovenia’s very strict net neutrality law has been analysed very little by non-Slovenes.”

In response to this research gap, this paper provides an in-depth case study analysis of Slovenia’s net neutrality policy. It takes into account the specifics of Slovenia as a small, “peripheral” country (*ibid.*), while at the same time being a pioneering nation with a relevant background in new technologies (cf. Negroponte, 1995: 182, and Naisbitt, in Milosavljević, 1996: 35), and examines the processes of policymaking and their democratic implications in light of developments in the European Union and the United States. Through this, the paper aims to contribute to the internationally relevant research of: (1) the net neutrality policy, its evolution and outcomes; and (2) the position, options and power of small countries in the transnational context of electronic communications.

Building on the idea of the policy formulation cycle as described by Nachmias and Felbinger (1982), the document analysis (Bowen, 2009) first focused on policy documents from the period in which net neutrality was introduced to ZEKom-1 (2010–2012). The policy implementation stage was studied through decisions made by the national regulator, the Agency for Communication Networks and Services of the Republic of Slovenia (AKOS), in 2013–2015. The most recent period of 2016–2018 provided a rich ground for studying policy outcomes, their evaluation and adaptation with the adoption of EU rules on net neutrality and their direct effect, court re-

jections of the regulator's decisions, the watering down of the original wording of ZEKom-1, and new cases of zero-rating practices by operators. To gain a practical insight into these policy implications, interviews with selected stakeholders were included in the final stage of the analysis.

The Moving Target of Political and Theoretical Considerations

It was stated in the 1930s that “the future technology cannot be predicted, organized, and administered” (Lippmann, 1937: 16). This is even more applicable today, with technology evolving and changing at an unprecedented rate, and public policy and law inevitably lagging behind. When examined on a global scale, there is a gap between the proponents and opponents of regulation. On one side are approaches advocating the need “to synchronize our technological progress with our principles” (former U.S. State Secretary Hillary Rodham Clinton discussing Internet Freedom, 2010) and addressing technological transformations with “adequate” legal and regulatory changes and updates. This applies not only to limitations, but also to the promotion and stimulation of innovation and development. On the other side are those who oppose any regulation of the internet, with some key authors claiming that “national law has no place in cyber law” (Negroponte, 1995: 236).

The debate on network (or net) neutrality evolved from concerns in the late 1990s that the vertical integration of cable firms with ISPs would threaten the internet's end-to-end design (Verhulst, 2011: 9). Even though the term dates back to 2003, when it was first used by Wu (2003), it has no universally accepted definition. However, according to Gilroy (2008), many authors agree that any definition of net neutrality needs to include the principles that ISPs should not control how consumers lawfully use the network, and should not be able to discriminate against content provider access to the network. Net neutrality can thus be described as “a network design principle that argues for the need to have a ‘neutral’ public network carrying every form of information and supporting every kind of application, without discrimination or preferential treatment” (Verhulst, 2011: 7). It should guarantee that internet users can choose freely how to utilise their own internet connection, without undue interference from public or private entities (Belli & De Filippi, 2016: 3).

The net neutrality debate is closely (although not exclusively) tied to issues of technological innovation, economic development and information access (Cheng et al., 2010), affecting the “daily welfare of millions of citizens who rely on the Internet as a critical resource” (Meinrath & Pickard, 2008: 1), and having broad implications for the media landscape and the future of online media (Verhulst, 2011). This debate is only partly about economics and technology; it is also “about fundamental rights of citizens as well as public welfare for consumers, and /.../ it is about educated and

informed users as well as optimally priced access networks” (Marsden, 2010: 19). The debate has prompted reconsiderations about which public interest values are promoted by a “non-discriminatory” or “neutral” internet, and whether access-tiering threatens the public interest (Ganley & Allgrove, 2006: 455).

Today, the net neutrality debate rests on two fundamental assumptions: (1) the belief that internet traffic is increasing at a rate that cannot be handled by the current technology and traffic management techniques; and (2) the ISPs’ claim that they cannot bear the cost of the necessary network infrastructure without tapping additional revenue streams and thus yielding a non-net neutrality scenario (Krämer et al., 2013: 807). The debate is often framed as having two sides, with operators on one side, and content and service providers, anti-regulation advocates, entertainers, and free speech groups on the other. However, as Ganley and Allgrove (2006: 455) emphasise, net neutrality is a complex issue, involving the public interest with regard to legal, practical and commercial considerations.

Pro- and Contra Net Neutrality and its Regulation

Opponents of net neutrality mostly cite property rights and the efficiency of resource allocation, claiming that the welfare of network users is ensured by competition. To them, the freedom to experiment without restrictions imposed by net neutrality policy encourages innovation by telecom companies (Verhulst, 2011: 13), while regulation reduces incentives for investing in network infrastructure (Cheng et al., 2010; Choi & Kim, 2010), thus putting future benefits to end users at risk (Verhulst, 2011: 11). Besides pointing to the intricacy of defining ‘neutrality,’ opponents of regulation emphasise the difficulty of drafting and enforcing the rules, and maintain that heavy-handed regulation of the internet ecosystem could lead to major job losses and other negative consequences.

Interestingly, advocates of net neutrality also use the argument of technological innovation in their plea for regulation. For them, net neutrality has been the main driver of the growth and innovative applications of the internet since its earliest days (Choi & Kim, 2010: 447). They counter the argument of net neutrality’s negative impact on financial incentives by stressing that content and service providers have financially supported network enhancements through subscription and bandwidth charges for years, and will continue to do so (Verhulst, 2011: 12). Further, advocates use free speech, consumer rights, and other public interest arguments, such as: tying net neutrality to the concepts of freedom of expression, individual autonomy and democratic participation (Verhulst, 2011: 13); emphasising the protection of consumer rights to use any content, application, or service on a non-discriminatory basis without interference from service providers (Cheng et al., 2010); and suggest-

ing that net neutrality enables users to participate in cultural production, thus empowering them. Today, the ability to receive and impart ideas and information freely, and the right to fully participate in democratic life, depend on the nature of one's internet connection; as a result, net neutrality enables self-determination "by directly contributing to the effective enjoyment of a range of fundamental rights as well as to the promotion of a diverse and pluralistic media landscape" (Belli & De Filippi, 2016: 3).

Government regulation, aimed at protecting consumers from blocking, discrimination, lack of transparency, and degradation of services has been the most discussed approach to secure net neutrality, according to Verhulst (2011: 15). Since 2012, net neutrality has progressed from regulatory proposals to regulatory action in some advanced and developing nations (see Marsden, 2016). Depending on the characteristics of their juridical systems and national telecommunications markets and the degree of their infrastructure development, states have adopted different regulatory approaches to network neutrality (Belli & De Filippi, 2016: 3–4). European Union rules on net neutrality have applied since 2016, following the adoption of Regulation (EU) 2015/2120 by the European Parliament and the Council (European Commission, 2017). The regulation "enshrines the principle of net neutrality: internet traffic shall be treated without discrimination, blocking, throttling or prioritisation" (ibid.), and provides grounds for individual and enforceable rights for end-users in the EU to access and distribute the internet content and services of their choice. However, commercial offers based on price discrimination between applications (zero-rating) have not been ruled out.

Small States: Followers or Inspirers?

Small states are an empirically relevant unit for studying net neutrality policies, because: (1) there is a large number of them, including within the EU where the population of more than half the member states is lower than 10 million; (2) they can be significant members of the international community, both individually and collectively (when they join forces to attain a common goal), and can influence policymaking decisions at the EU level; and (3) they can react differently to policy challenges, due to their specific circumstances and interests. In audiovisual policies, which share some principles and objectives with internet policies (e.g. freedom of expression), the connection between the smallness of the state and its policy approach is far from straightforward. On one hand, small states tend to be more susceptible to political parallelism and more prone to exercise interventionist approaches (Hallin, 2009; Puppis, 2009; Puppis et al., 2009), while on the other they rarely employ a full portfolio of regulatory options (Raats et al., 2018: 203).

The latter was not the case in Slovenia in the early years of the current decade, when discussions on net neutrality regulation were in full swing. Despite that, the second country in the EU and the third in the world to stipulate net neutrality stipulated by law has been more or less overlooked by international comparative research. When observed, it was usually merely noted as a country with “tougher net neutrality rules” (e.g. Gharakheili et al., 2016: 66), or analysed with a limited methodological approach (e.g. Marsden, 2016).

From its time as a state of the former Yugoslavia to its current reality as an independent country and EU member state, Slovenia has had relatively good and varied access to communication and information technology and services. Within Yugoslavia, Slovenia was the first to launch democratic reforms in the 1980s, resulting in political and cultural pluralism with some free market enterprise, also labelled market socialism (Bajomi-Lázár, 2014). It followed by declaring and gaining independence in 1991, and later, as an independent state, established a Ministry of Information Society to address issues related to information-communication services. “Equal access to the telecommunication market and services” was cited among the priorities of the state defined by this Ministry (Gantar et al., 2001: 7).

Methodology

The paper addresses the following research questions:

Q1: How has Slovenia’s net neutrality policy evolved from 2010 to 2018 in the context of EU net neutrality policy?

Q2: What are the implications of net neutrality policy outcomes for the country’s position in further EU digital policymaking?

We applied mixed methods (Small, 2009; 2011), combining documentary and ethnographic approaches, primary and secondary information, and written and oral sources, to increase the reliability of our findings (Denzin, 1970; Olsen, 2004). Most information was collected via desk research, from publicly available reports, policy papers and legal acts, although some parts came from interactions with selected stakeholders.

The document analysis was divided into three segments based on the key stages in the net neutrality policy cycle (cf. Nachmias & Felbinger, 1982):

- Analysis of government and parliamentary documents; suggestions and reactions by NGOs, industry, and other stakeholders from the time the problem was identified; and the discussion, formulation and adoption of policy as part of ZEKom-1 from 2010 to 2012.

- Analysis of documents related to implementation of the law from 2013–2015, i.e. the annual reports and decisions of AKOS, the national regulatory authority: (1) 06101-747/2014/4 regarding Telekom Slovenia and Deezer; (2) 06101-813/2014/4 regarding Si.mobil and Hangar mapa; (3) 06101-1412/2014/4 regarding Amis and its service Amis MobiaTV; (4) 06101-1413/2014/4 regarding Tušmobil and its service Tuškabina; and (5) 06101-37/2015/13 regarding Telekom Slovenija, TViN and Tvin Shramba services.
- Analysis of documents related to policy outcomes, evaluation, and adaptations from 2016–2018, during the later stages of the policy cycle. This includes decisions made by the Administrative Court of the Republic of Slovenia: UPRS sodba I U of 5 July 2016 and UPRS sodba I U 1350/2015 of 12 July 2016; AKOS' annual reports and communications; the revision of ZE-Kom-1; and official statements regarding the zero-rating practice of A1, the second largest telecom company in Slovenia.

To get first-hand insight into the outcomes of regulation, as well as its evaluation and adaptation, we supplemented the third phase of document analysis with “semi-structured interviews” (Berger, 2014: 160). We interviewed three stakeholders with different roles and positions in relation to net neutrality: (1) a representative of the regulatory authority, entrusted with implementation of the net neutrality law; (2) a representative of the internet civil community, advocating non-discriminatory treatment of communication via the internet; and (3) a representative of a digital technology company in a close business relationship with network operators and ISPs. The interviewees were: Katja Kmet, Head of the Supervision Department for Operators, AKOS (in-text reference: intNRA); Katja Koren Ošljak, an ambassador for EU Code Week in Slovenia and a member of the Steering Committee of SloIGF, the Slovenian Internet Governance Forum (in-text reference: intCSO), and Andraž Logar, the CEO of successful Slovenian tech company 3fs, which has a strong international presence (in-text reference: intTECH). The interviews were conducted between 11 December 2018 and 4 February 2019 by one of the co-authors of this article.

Results: Net Neutrality Policy Evolution and Outcomes

Presented in chronological order, the results reveal complex and sometimes unexpected interactions, positions and decisions regarding the key actors. Together they form an almost complete policy cycle (Nachmias & Felbinger, 1982), from identification of the problem to policy formulation, adoption and implementation, and finally, adaptation and partial termination. Thus they offer an insight into possible further developments with respect to net neutrality in Slovenia.

First Stage: Preparation and Adoption, 2010–2012

The first stage, from 2010–2012, was the preparatory stage, from the first discussions about the significance of net neutrality to its introduction into ZEKom-1. The analysis is based on government and parliamentary documents, suggestions and reactions from NGOs, industry, and other stakeholders, and media interviews, reports and comments on the political process of preparing and adapting the law.

The previous research into this stage of Slovenia’s adoption of net neutrality in its legal framework, conducted by Marsden (2016), noted two elements: (1) an extensive parliamentary debate about Slovenia’s net neutrality law; and (2) opposition from the dominant ISP and trade unions: “The net neutrality law (was) drafted as an innovation measure in response to hostility by the dominant ISP and trade unions towards competition in Internet supply” (ibid., 14). The analysis of parliamentary and government documents and related media reports confirms the first element, and the first part of the second element. However, there is no record of hostility from “trade unions towards competition in Internet supply.”

After its initial quick response to the new ICT in the early 1990s (as previously mentioned by Negroponte, 1995, and Naisbitt, 1995) and the establishment of its Ministry of Information Society as a significant political and government response to the new challenges (even if only symbolically), Slovenia began to slow and even stagnate in terms of new ICT and internet concepts and policies. Key media analysts and commentators claimed a “digital spinning in a circle” (Ropret, 2009) was taking place, and that there was a lack of energy or willingness in related areas such as digital copyright, piracy, and online service and content supply (Ropret & Kučič, 2011).

In autumn 2012, the Ministry of Education, Science, Culture, and Sports presented its ZEKom-1 proposal, which included Article 203 on net neutrality. The proposal and Article 203 were “jointly attacked by all Slovenian ISPs and their lobbyists, lawyers, representatives for regulatory issues, members of management boards, and consultants. Most ISPs presented similar arguments, echoing those repeated around the world by ISP associations” (Kučič, 2015). A consultant on the management board for regulatory issues at Simobil, Slovenia’s second largest mobile phone operator and a significant ISP, stated, “We think that the key focus should be on transparency, not on the limitations of the market supply and offer” (Anžič in Ropret, 2012). Likewise, Telekom Slovenija, the country’s largest mobile operator and ISP, claimed it was already providing net neutrality and non-discriminatory treatment of all internet traffic, and would continue to do so in the future (Ropret, 2012). ISPs generally wanted the Ministry to wait for the recommendations of the European Commission (ibid.).

Because of the proposed law, parliamentary parties and political stakeholders found themselves “under extreme pressure from a financially strong interest group”

(Kučić, 2015). According to later media reports, the Minister responsible for the law at the time “almost gave up and disowned net neutrality as part of the law” (ibid.). However, the Ministry managed to bring the proposal to the stage of parliamentary discussion, where ISP operators asked some parliamentary parties to request amendments to the law. “The most aggressive proposal was put forward by a group of parliamentary members from the Social Democrats (SD)” (ibid.). The Social Democrats proposed that the third, fourth and fifth paragraphs of Article 203 be erased, and the sixth be changed to: “The Agency will adopt a general act after the adoption of the guidelines issued by the European Commission for the fulfilment of the content of this article” (Državni zbor RS, 2012).

According to their explanation of the proposal, the implementation of the precise articles is too hasty as the European Commission is still preparing the exact proposals. The guidelines of the European Commission, which aim to unify the legal framework of all members of the EU, and which all the members of the EU will need to adopt, will supposedly be prepared by the beginning of next year. The law is thus obliged to define only the responsibilities of the Agency to adopt a relevant sub-legal act that will be in accordance with the adopted guidelines of the European Commission (ibid.).

The erasure of these paragraphs from Article 203 would eliminate the rules regarding net neutrality in the law; all that would remain would be the regulator’s principled intention to “aim and attempt to achieve it” (Kučić, 2015). However, the Social Democrats’ proposal was not supported by any other political party in the parliament. This development was partly assisted by an informal network of opinion makers, such as media commentators (Lenart J. Kučić in the largest daily newspaper, Delo), activists and NGOs (Domen Savič and Resimo.net), and various other stakeholders in the field of regulation and digital society (such as Dušan Caf, blogger and chairman of the AKOS Council, and Aleš Špetič, appointed Digital Champion by the government in May 2012), indicating that power and influence rested not only with the industry, but also with non-governmental organisations, civil society initiatives and activists. With the support of this network of stakeholders, the law was adopted. However due to a “coordinated proposal” by various political parties, the second paragraph that explicitly prohibited the price discrimination was erased (Kučić, 2015).

Second Stage: Implementation, 2013–2015

Slovenia’s state owned incumbent telecom company Telekom Slovenije had been offering zero-rated content and services since the end of 2013. In its mobile data services, specific traffic streams were exempted from data caps and could be used

either without volume limits, or with limits significantly higher than those of the data caps. Its offer included HBO GO, UEFA Champions League video streaming, music streaming service Deezer and its own cloud data storage service (TViN Shramba).

The final text of ZEKom-1, adopted in the last days of 2012, stipulated in its Article 2013 that the ISPs were not allowed to restrict, delay or slow internet traffic, except when solving congestions, preserving security or addressing spam. Differentiation of the quality of internet traffic as an instrument to distinguish between internet services for commercial reasons was prohibited. ZEKom-1 came into force in the first weeks of 2013, but there were no regulatory activities before 2014, when AKOS started supervising the price differentiation practices of the main ISPs at the request of the Council of Electronic Communications (SEK), an independent advisory body hosted by AKOS.

There was much speculation about the willingness of the regulator to apply the new law. Before the adoption of ‘the net neutrality law’, the capacity of AKOS was a major concern of Žiga Turk then Minister for Communications, who assumed that “implementing net neutrality in a nation with such a weak regulator would prove very difficult” (Turk, 2015). This opinion was shared by Dušan Caf, then Chairman of SEK, who stated that AKOS, “led by a former industry executive, has not been an advocate of net neutrality. Instead, it has taken a pro-industry stance on net neutrality and has not opposed attempts to weaken or even remove net neutrality provisions from the law” (Caf, 2014).

Nevertheless, in early 2015 the regulator issued decisions regarding five ISPs, including Slovenia’s two largest players in the communication services market: Telekom Slovenije and Si.mobil (later renamed A1). All were ordered to stop prioritising data for the benefit of their applications within a maximum of 60 days. The decisions were praised as they “confirmed Slovenia’s place among those few countries in Europe /.../ committed to the principle of net neutrality”, and were anticipated to serve as a precedent in future cases (ODI.Law, 2015). However, this did not happen, because by the end of the year the European Parliament and the Council adopted a common EU framework, removing the barriers to a digital single market and addressing, among other issues, net neutrality.

Third Stage: Evaluation, Adaptation, Termination, 2016–2018

Regulation (EU) No. 2015/2120 came into force on 30 April 2016. It outlined common rules at the EU level to protect the equal and non-discriminatory treatment of traffic in the provision of internet access services, and the related rights of end users. When voting on Regulation (EU) 2015/2120, Slovenia did not support the final text

on the protection of net neutrality, explaining its decision with arguments clearly indicating the country's commitment to a free, open and neutral internet:

Slovenia fears that the new arrangements will result in a two-layer Internet: a slow 'best effort' service model and a high-speed Internet with guaranteed quality for an additional charge. Slovenia believes that this is the wrong response to the competitive challenges facing the European industry in the global digital market. Also, given the current legal protection of Internet neutrality in Slovenia, we cannot support the final TSM regulation (Council of EU, 2015).

The opinion stressed that "effective net neutrality rules also require discriminatory pricing practices to be clearly prohibited" (ibid.) and regretted that a clear ban on price discrimination, although applied effectively in some countries, was not included in the final compromise.

The Regulation, which is directly applicable, has required EU Member States to lay down rules on penalties applicable to infringements. AKOS was designated the competent body for the implementation of the Regulation, and is responsible for misdemeanour and inspection procedures. With the enactment of the Regulation, Article 203 of ZEKom-1 was not implemented, as it had ceased to have an effect.

In June 2016, the Administrative Court of the Republic of Slovenia decided in five administrative disputes over the legality of AKOS' decisions in supervision procedures related to violation of the provisions of Article 203 of ZEKom-1, issued at the beginning of 2015. AKOS' decisions were consequently abolished. The Administrative Court found that the regulator misinterpreted Article 203 of ZEKom-1 when it claimed that price discrimination in the treatment of internet traffic was prohibited (Upravno sodišče RS, 2016). In repeated procedures, AKOS followed the directions of the Administrative Court. In four cases it issued new inspection decisions, and in one the procedure was stopped. Misdemeanour decisions were also repealed.

In his blog, SEK Chairman Dušan Caf, a key promoter of net neutrality in Slovenia, observed bitterly: "The international reputation of the state, committed to protecting open and neutral Internet access, did not last long. It was razed by the Administrative Court, which abolished AKOS' decisions to ban violations of net neutrality by superficial judgments" (Caf, 2016). The court decisions coincided with a debate about BEREC's guidelines on network neutrality, and some saw in that an opportunity to warn against such practices (ibid.). In some circles, Slovenia became an object of ridicule (cf. STRAND Consult).

The regulator's lukewarm reaction to the last case of a zero-rating practice in Slovenia, which aroused public interest in September 2018, therefore did not come as a surprise. A1 Slovenija, the country's second largest mobile operator, has since been offering its users unlimited access to certain services in individual packages. The

use of Facebook Messenger, Viber, WhatsApp, Netflix, HBO Go, Deezer, Apple Music, and A1 Now is not included in the consumption of data that the user has leased. To our interviewee from the internet rights advocacy community, the reaction of the regulator was “silent consent”. She has not noticed much public debate, and attributes this to the smallness of the internet community in Slovenia:

When the latest zero-rate offer was presented by A1, people were busy discussing hate speech online in reaction to the Prime Minister’s statement on the practices of certain media outlets. It’s a small community, and if people are occupied with one debate they can’t engage that intensely in another. Besides, it’s difficult to present zero-rating as a problem since it doesn’t have any immediate effects, and can also be seen as positive, since it’s about free services. For more informed discussions the government should put more effort into the promotion of civic digital literacy. It should not be the exclusive responsibility of the individual. The state has to invest more. What is necessary for the people is to acquire more knowledge on infrastructure, and on who the stakeholders are. In Slovenia there are lots of digital literacy events and initiatives, but no coordination. Instead, we have a futile competition between institutional stakeholders (intCSO).

In reaction to the A1 zero-rating offer and the stir it caused, AKOS issued a statement acknowledging that “Slovenian operators have started to follow a widespread practice in most European countries, where such offers on the market have been present for a long time” (AKOS, 2018). The regulator explained that neither Slovenian nor European law prohibits zero-tariff offers, thus leaving AKOS without a legal basis for banning them. Nevertheless, they “will continue to monitor developments in the market, paying special attention to zero-tariff offers and their possible negative effects on the rights of end-users. In doing so, the BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules will be strictly followed” (ibid.).

This reveals a harmonisation of the Slovenian approach with that of the EU, an observation confirmed by our AKOS interviewee:

It’s clear from the EU Regulation that zero-rating per se is not prohibited, and cannot be prohibited by national laws. No law on this subject should be adopted in any member state, because the EU regulation is directly applicable. So, indeed, we have full harmonisation, no more pioneering deviations. AKOS is no longer a soloist, and the only chance of having any influence over how things are regulated is by participating in drafting BEREC’s documents, as they significantly impact implementation. Regulators and member states should pay more attention to make sure they don’t impair such an important service as the internet. The ‘best effort’ approach will soon be insufficient. I’m waiting for the moment when all states realise that the internet is a public service (intNRA).

The industry would prefer to see the internet unregulated. Our interviewee from the successful Slovenian tech company whose main expertise lies in business and advising large telecommunication companies stated the following:

An unregulated internet is better for creating OTT business models. For small tech firms, sometimes the only chance of creating revenue is through co-operation with operators. Reaching the end user without the help of an operator is difficult; the alternatives are global platforms, which are even less neutral and open. The problem with regulation is that it often serves existing models, and can hinder innovation and newcomers. Zero-rating is a normal business reaction, but is not productive in the Slovenian market. From a business angle, price differentiation is more suitable for third-world markets, where the price sensitivity is higher (intTECH).

Discussion

Net neutrality is not just a technical or business problem, but is closely related to democracy and the public sphere. The ability of network operators to facilitate or restrict communication affects freedom of expression, the right to assembly, the right to see and be seen, access to information, and content and information diversity, and plurality. The concept is far from being clearly and firmly defined, and has varying relevance in different political and economic realities.

Slovenia became one of the first countries in the world to enact net neutrality. Today, Article 203 of ZEKom-1, which stipulates net neutrality, is subordinate to EU rules on net neutrality, and was changed in 2017 to limit the discretion of the regulator. Nevertheless, Slovenia remains one of the few countries in the European Union with net neutrality enshrined in its national law. For a short period, the principle had not just been a concept on paper. The national regulator AKOS enforced it through a series of decisions addressing the differential treatment of internet traffic and zero-rating pricing strategies of Slovenian ISPs. While in the rest of the EU and around world there was significant uncertainty over net neutrality in academic and political circles, the Slovenian authorities strongly supported it. Safeguarding net neutrality with statutory legislation could be deemed part of Slovenia's commitment to the values of an open internet. Yet, the ability of small countries to counter trends in the larger surrounding markets, and policy developments at a transnational level (especially at EU level in the case of members and aspiring members), is often short-lived and limited. Genna mentions Slovenia in this context in his reaction to the European Commission's Memo/15/5275 of 30 June 2015 announcing the EU normative solution for net neutrality. Genna praised the Netherlands and Slovenia as the only countries to prohibit zero-rating practices and claimed that the ambiguous wording of net neutrality provisions in the EU's Single Telecom Market (STM)

regulation would affect the clear and straightforward Dutch and Slovenian legislation, which would “need to be repealed (as it was declared by respective governments when voting against the STM)” (Genna, 2015). Marsden agreed with Genna that the EC interpretation was “misleading, deliberate or not” (Marsden, 2016: 30).

There were three distinct stages in Slovenia’s net neutrality policy evolvement. In the first stage, the strong personal involvement of the Minister and the support of an informal network of opinion makers, such as media commentators, activists, NGOs, and other stakeholders in the field of regulation and digital society, led to the adoption of the net neutrality provisions despite opposition from the industry and an important political party. In the second stage, the regulatory authority overcame its initial hesitation to ban zero-rating practices by the country’s five biggest ISPs. Immediately afterwards, the third stage saw a surprising turn: the Slovenian Administrative Court abolished AKOS’ decisions shortly after the enactment of the EU rules on net neutrality. Slovenia was unsuccessful in advocating for stronger EU net neutrality safeguards and the rules of the single digital market within the EU, which gave limited subsidiarity to member states, and made it impossible to apply the original Slovenian legal safeguards. The stronger national rules were thus watered down by EU policy, indicating a reduced potential for nation states to design their ICT and internet policy within the wider (legal) framework of the EU.

In literature, when authors emphasise the flexibility of smaller countries (“the small size of its economy”; “its relative lack of importance” to the major technology companies; “it enables the country to overcome both internal and external lobbying and pressure that would likely sink similar initiatives elsewhere” [Eaves, 2013]), the wider legal and political ecosystem should be also considered. It is true that “innovation, particularly in policy, often comes from the margins” (ibid.), however national policy is shaped – and limited – by other decision-makers too, particularly when a country is a member of an entity such as the European Union.

Despite this, according to our analysis the implications of net neutrality policy outcomes for the country’s position in further EU digital policymaking are not negative. The Slovenian net neutrality policy, adopted before the common EU regulatory framework, might have had a role in pressuring the EU to adopt a unified approach to net neutrality. Additionally, Slovenia’s readiness to put forward other digital policy solutions before EU policies are articulated does not seem to have been affected. With regard to the failure of the proposed EU digital tax reforms, and the slow progress of a global solution in the OECD, the Slovenian Parliament’s Finance Committee adopted a resolution in May 2019 proposing a government bill on digital service taxation in Slovenia. The Committee expects the bill to be submitted by April 2020, and enacted by September the same year. Should the government follow this recommendation, Slovenia would join France, Austria, the Czech Republic, It-

aly and Spain in announcing similar laws, sending a clear political signal for the acceleration of international cooperation and a common EU response. This confirms that small states can be significant policy stakeholders, both individually and collectively, and can influence policymaking processes at the EU level. This is partly because they can respond differently and more swiftly to common policy challenges, due to their specific economic and cultural circumstances.

As the EU has started discussing the implications of the fifth generation of mobile communications (5G) on net neutrality, the scope of research in Slovenia and other EU countries should be extended to cover the new risks related to control of the information flow (e.g. network slicing). This research should take into account variations in the significance of net neutrality and its impact on the public sphere in different national contexts. It is also worth considering “neutrality” as a concept: is its current understanding still relevant when network operators are no longer the main players in the digital ecosystem? Even if these operators regain some power with the launch of 5G, they are often limited to national or regional markets. As the global economic dominance of platform operators such as Google and Facebook – which operate digital platforms, another type of ‘infrastructure’ – continue to shape the economic and social aspects of digital ecosystems, the concept of ‘net neutrality’ addressing old ‘legacy’ infrastructures and stakeholders is becoming too narrow. To include new powerful stakeholders who influence communication in transnational and national contexts, net neutrality as a concept should be questioned and researched, and an update addressing the issue of ‘platform neutrality’ is recommended.

This analysis of the evolution of Slovenian net neutrality policy has its limitations: a wider timeframe could be analysed, and other methods employed. In-depth interviews with all the relevant stakeholders of the last decade could give additional insight into the reasons, motivations and obstacles that affected how net neutrality policy in Slovenia was prepared, adopted, and later watered down, as a result of decisions made by the Slovenian judiciary and the European Union. This could include interviewees from the judiciary branch and related European Union bodies.

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Neutralnost interneta u “pionirskoj zemlji s periferije”: Politički procesi, posljedice i trendovi u Sloveniji

Marko Milosavljević

Melita Poler

Tanja Kerševan Smokvina

SAŽETAK

Ovaj rad analizira politike i propise koji se odnose na neutralnost interneta u Sloveniji. Prati ih od hrabrih početaka 2012. do njihovog usklađivanja s prevladavajućim trendovima i praksama u Europskoj uniji, nakon donošenja pravila EU-a o neutralnosti interneta u 2016. godini. Ova studija, utemeljena na kvalitativnoj analizi dokumenata i dopunjena intervjuima sa sudionicima cijelog procesa, pokazala je da Slovenija nije bila uspješna u zagovaranju jačih zaštitnih mjera neutralnosti interneta u Europskoj uniji. Pravila jedinstvenog digitalnog tržišta unutar EU s ograničenom supsidijarnošću država članica onemogućavaju tako primjenu izvornih slovenskih pravnih jamstava. S jedne strane, to ukazuje na manju mogućnost država članica da zagovaraju ciljeve svoje komunikacijske politike u okviru EU-a, i s druge strane, manju sposobnost da utječu na donošenje politika EU-a poticanjem bržeg zajedničkog odgovora s neovisnim djelovanjem. Potrebna su daljnja istraživanja o potencijalnoj ponovnoj procjeni i proširenju koncepta neutralnosti interneta, koji je trenutno ograničen isključivo na Internet, kako bi u potpunosti obuhvatio i diskriminatorni odnos prema internetskom prometu.

Ključne riječi: neutralnost interneta, male zemlje, Europska Unija, Slovenija, regulacija